No. 94-23

In the
Supreme Court of the United States
October Term, 1994

CITY OF EDMONDS,
Petitioner,
v.
WASHINGTON STATE BUILDING CODE COUNCIL, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, CITY OF EDMONDS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

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INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of petitioner, City of Edmonds. Consent to the filing of this brief has been granted by counsel for all parties. The

letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the arguments that will be put forth by the parties to this action. It is believed that PLF's public policy perspective and litigation experience in support of individual rights and government accountability will provide an additional viewpoint with respect to the constitutional and statutory issues presented. PLF has participated in numerous cases involving local zoning and land use regulations: *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); cases that address the possible discriminatory effect of local ordinances, *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); and cases that address the balance between federal and local regulatory power, *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348 (1991).

PLF is interested in this case because of the sensitive issues of federal intrusion into the realm of zoning and land use regulations, an area that since the establishment of our federal system has been the exclusive domain of local governmental authority, that are present in this case. PLF

seeks to provide this Court with public policy perspectives on the balancing of local and federal interests when a particular zoning scheme might run afoul of the admittedly federal interest in suppressing all forms of discrimination against the handicapped.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802 (9th Cir. 1994). The Ninth Circuit held that local zoning ordinances that limit only the number of unrelated persons who may live together are subject to the mandates of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (the Act), and the Fair Housing Amendments Act of 1988 (FHAA), which extended the Act's antidiscrimination provisions to the handicapped. 42 U.S.C. §§ 3604(f)(2), 3604(f)(3)(B), 3607(b)(1). *Edmonds*, 18 F.3d at 806-07.

This conclusion was arrived at notwithstanding the unambiguous exemption found at 42 U.S.C. § 3607(b)(1), which states that the FHAA will not "limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

INTRODUCTION

Oxford House, Inc., sponsors halfway houses around the country for recovering alcoholics and drug addicts. Oxford House has determined that each recovery facility must have six or more residents "to ensure financial

self-sufficiency, to provide a supportive atmosphere for successful recovery, and to comply with federal requirements for the receipt of state start-up loans." *Edmonds*, 18 F.3d at 803. The home in which the Edmonds Oxford House seeks to establish a recovery facility is a leased residence in which 10 to 12 adult men will be housed at any given time. The house is situated in an area that is zoned single-family residential. *Id.*

Edmonds issued criminal citations to the owner of the Oxford House for violating provisions of the Edmonds Community Development Code (ECDC) which provide that property zoned single-family residential may only be used for single-family dwelling units. ECDC § 16.20.010(A)(1). A single-family dwelling unit means a detached building used by one family, limited to one per lot. ECDC § 21.90.080. Under ECDC § 21.30.010, a family "means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage." Thus, group homes of more than five unrelated recovering alcoholics and drug addicts are effectively excluded from single-family residential zones in Edmonds, but not from multifamily residential zones.[1]

Under the FHAA, it is unlawful to discriminate against any person because of a handicap. 42 U.S.C. § 3604(f)(2). The residents of the Oxford House are handicapped persons under the FHAA. 42 U.S.C. § 3602(h) (stating that a person participating in a supervised drug rehabilitation program,

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[1] Portions of the ECDC requiring a conditional use permit for group homes for the disabled in multifamily residential zones have been repealed, thereby enabling group homes to operate in homes situated in multifamily residential zones as a matter of right. Petition for writ of certiorari at 16-17.

coupled with nonuse, meets the definition of handicapped). Where FHAA's provisions apply, a finding of discrimination may be based on "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

However, under 42 U.S.C. § 3607(b)(1), FHAA's provisions do not apply to "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." The court below has recognized that the City of Edmonds has not acted with any animus toward or intent to discriminate against the occupants of Oxford House because of their handicap. *Edmonds*, 18 F.3d at 803.

Oxford House requested the City of Edmonds to make reasonable accommodations under Section 3604(f)(3)(B) by letting it continue operations in the single-family residential zone. The City of Edmonds declined and filed a declaratory relief action seeking a ruling that its single-family residential zoning provision was exempt from FHAA's provisions under Section 3607(b)(1).

The District Court held that the exemption applied, relying on the analysis provided in *Elliott v. Athens*, 960 F.2d 975 (11th Cir.), *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 287 (1992), an Eleventh Circuit decision that likewise involved an attempt to establish a group recovery home in a dwelling zoned single-family residential. However, the Ninth Circuit disagreed with the *Elliott* court's analysis and held that the exemption did not apply and that the zoning ordinance was in violation of the FHAA. The Ninth Circuit's decision therefore creates a direct and irreconcilable split among circuits with regard to how

FHAA's exemptions are to be interpreted. This Court is now asked to resolve the inconsistency in how zoning ordinances limiting the number of unrelated persons living together are to apply to FHAA.

SUMMARY OF ARGUMENT

The plain language of the Edmonds' ordinance and the plain language of FHAA's exemption provisions are sufficient to establish that the City of Edmonds need not submit to the lengthy and expensive process of determining whether "reasonable accommodation" has or must be made to the Oxford House under the FHAA. *See Elliott v. Athens*, 960 F.2d at 979-81.

The Ninth Circuit's decision significantly undermines local government's ability to enact land use regulations and represents an unwarranted and dangerous incursion of federal power into local governmental affairs. To the extent that land use and occupancy restrictions may be imposed by governmentally wielded police power, they ought to originate and be interpreted at the local level. This Court has long recognized that land use regulations and property law have traditionally been the province of state authority. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975).

This case also gives rise to the fundamental question of whether applying the FHAA to local governments in the manner presented in this case constitutes a valid exercise of the enumerated powers which the United States Constitution extends to Congress. Amicus will show that the framers did not contemplate that Congress would wield such intrusive powers and that the constitutional grant of authority upon

which Congress relied in adopting the FHAA does not support application of the FHAA in a manner that subjects the ordinance at issue in this case to federal manipulation

ARGUMENT

I

EDMONDS' ORDINANCE LIMITING THE NUMBER OF UNRELATED PEOPLE WHO MAY LIVE IN SINGLE-FAMILY RESIDENTIAL DWELLINGS IS EXEMPT FROM FHAA'S REQUIREMENTS

A. The City of Edmonds' Single-Family Zoning Ordinance Is Exempt from the FHAA by the FHAA's Clear Language

1. The Ordinance Restricts the Maximum Number of Individuals Permitted To Occupy a Dwelling

The FHAA exempts some regulations from its purview, including reasonable local restrictions on the maximum number of occupants permitted to occupy a dwelling. 42 U.S.C. § 3607(b)(1). The City of Edmonds permits five or fewer unrelated persons or two or more persons related as specified by ordinance to live in a single-family dwelling within its boundaries. ECDC § 21.30.010. The structure of the city's zoning code is common to the vast majority of cities in the State of Washington and many communities throughout the country. *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802. Although the Edmonds' ordinance makes a distinction between inhabitants

of a single-family dwelling who constitute a family and inhabitants who do not fit the ECDC definition of family, the ordinance nevertheless restricts the maximum number of occupants who may occupy a dwelling and is therefore exempt from the FHAA according to the FHAA's plain language.

The distinction between related occupants and unrelated occupants exists only to recognize the protection that the Due Process Clause of the Fourteenth Amendment extends to the family. This distinction, as defined by Edmonds' definition of "family," follows the form which this Court approved in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8-9 (1974) (holding that a zoning ordinance limiting single-family dwellings to a maximum of two unrelated persons without limiting the number of related persons was rationally related to legitimate interests relating to density, traffic, and quiet, open spaces for families).

Although *Belle Terre* did not address the specific question of whether the ordinance at issue constituted a maximum occupancy restriction, it did uphold the underlying constitutionality of the ordinance. The Court recognized that the ordinance at issue, much like the Edmonds' ordinance, is not aimed at transients, involves no procedural disparity, and involves no "fundamental" right. *Belle Terre*, 416 U.S. at 7. Coupling these factors with the Court's determination that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs" (*id.* at 9), the Court concluded that these are permissible goals and that "[i]t is ample to lay our zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.*

The ordinance also expressly avoids limiting the number of members of a family in light of this Court's teaching in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). *Moore* gave rich expression to the sanctity that is to be accorded the family and stated that the Constitution protects the family because of the family's deep historical and traditional roots and its role in passing down our most cherished moral and cultural values. *Id.* at 503-04. Based upon this recognition of the family's importance, *Moore* invalidated an ordinance which limited occupancy to members of a single family, but that defined family in a manner that prevented a grandmother from living with her grandson.

The Ninth Circuit's reasoning pays no attention whatsoever to this extremely important policy consideration and mentions the *Moore* decision primarily as an example of a use restriction similar to the one adopted in Edmonds. *Edmonds*, 18 F.3d at 806. The Ninth Circuit then states that "[a]pplying the [FHAA] exemption would insulate these single-family residential zones from the sweep of FHAA requirements." Amicus fails to discern the horrible consequences that would flow from exempting otherwise constitutional zoning regulations from the reach of FHAA simply because the regulation recognizes that a family, even an extended family, is immeasurably different from a group of unrelated individuals living together in circumstances that often pose a significant threat to the solitude and protection that government is legitimately charged with providing for families.

The Eleventh Circuit in *Elliott*, examined both *Moore* and *Belle Terre* and concluded that "it is apparent that Supreme Court precedent sanctions zoning limitations based upon the number of unrelated persons living together" (*Elliott*, 960 F.2d at 980) and that "*Moore* and *Belle Terre*,

read together, indicate that a reasonable method of controlling density is to place occupancy limitations on unrelated persons but not on related persons." *Id.* at 981. The *Elliott* court then correctly concluded that the zoning restriction there at issue, which likewise limited only the number of unrelated persons who could occupy a single-family dwelling, was a maximum occupancy limitation. *Id.*

The Ninth Circuit, however, adopts a construction of the FHAA exemption that would categorically exclude any zoning restriction which differentiates between the number of related versus unrelated occupants. *Edmonds*, 18 F.3d at 805. In reaching this construction, the Ninth Circuit ignored the plain language of Section 3607(b)(1) and elevated language from a single committee report to the status of *the* declaration of congressional intent. The Committee Report relied upon below states that under the exemption found in Section 3607(b)(1), "[r]easonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status." H.R. REP. No. 711, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2192 (committee report). The reasoning that since the zoning ordinance at issue did not apply to "all occupants" but only to unrelated persons, it did not fit the criteria for exemption ignores the plain language of the statute, the purpose of FHAA and the context of the phrase "all occupants."

Section 3607(b)(1) applies to "any reasonable local, State, or Federal restriction[] regarding the maximum number of occupants permitted to occupy a dwelling." This language is admittedly broad, with no indication that certain methods of determining maximum occupancy limitations are exempt while others are not, as long as the particular method

is reasonable. Unfortunately, the Ninth Circuit was unable to "discern from the plain language of the statute whether Congress intended to exempt Edmonds' zoning ordinance." *Edmonds*, 18 F.3d at 804. Noting that Section 3607(b)(1) could be interpreted either as only including ordinances that restrict the number of all occupants or as including ordinances that limit just the number of unrelated occupants, the Ninth Circuit found that "neither follows directly from the plain language." *Id.*

Amicus contends that the plain language in fact supports the construction propounded by petitioner. The ordinance is reasonable (*see* discussion, *infra*), and it limits the maximum number of people who may live in a single-family residence. The fact that this limitation is something less than a universal limit on all categories of occupants should not alter the fundamental nature of the limitation, as long as the limitation is not drawn along unconstitutional lines. Indeed, the Ninth Circuit has taken what must be considered to be at least some form of maximum occupancy limitation and *limited its applicability* under the FHAA. This result is what Section 3607(b)(1) was expressly designed to prevent. Because the ordinance meets the plain language of the statute, reference to congressional intent is unnecessary.

If, however, the Court deems it appropriate to look into Congress' intent behind FHAA and its exemption, this Court should recognize that the Committee Report relied upon below represents but a thin slice of evidence of Congress' intent on this matter. Moreover, portions of the Committee Report that evince an intent to exclude ordinances such as the one here at issue were ignored. A careful reading of the Committee Report indicates an unequivocal intent to prohibit only those laws and regulations "which discriminate against individuals with handicaps," or that constitute "application of special requirements through land use regulations," or the

"enforcement of otherwise neutral rules and regulations ... in a manner which discriminates against people with disabilities." Committee Report at 2185. Thus, excluding the Edmonds' zoning ordinance from FHAA oversight works no violation of FHAA's purposes since it does not discriminate, either directly or indirectly, against the handicapped or any other protected group.

To the limited extent that the Committee Report can be looked to as evidence of congressional intent, it should also be recognized that the inclusion of "familial status" in the list of grounds for discrimination which the FHAA was designed to prevent in no way jeopardizes the Edmonds' ordinance. "Familial status" refers specifically to "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or persons having such custody." 42 U.S.C. § 3602(k). No such discrimination is implicated by Edmonds' zoning ordinance.

Also, the committee mentions, by way of example, that "[*a*] *number of jurisdictions* limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit." *Id.* (emphasis added). If Congress intended such a method of limiting occupancy to be the sole method contemplated by the FHAA exemption, surely Congress would have done more than merely mention it as a method employed by a number of jurisdictions.

The court in *Elliott* expressly stated:

> We do not believe that Congress intended that the maximum occupancy limitation exemption would apply *only* to a limitation on the maximum number of persons per square foot of dwelling space. A careful reading of the legislative history demonstrates that Congress was merely giving examples of the type of restrictions on occupancy that would be reasonable.

Elliott, 960 F.2d at 980 (emphasis in original).

Thus, the Edmonds' ordinance's constitutionally appropriate accommodation of familial interests should not render its remaining language any less of a restriction on the maximum occupancy of a single-family dwelling.

2. The Ordinance Is Reasonable

Under the FHAA, "reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling" are exempt from FHAA's purview. 42 U.S.C. § 3607(b)(1). The Edmonds' ordinance is a reasonable restriction on the maximum number of occupants who may occupy a dwelling. The City of Edmonds has an unquestionably legitimate interest in the tranquility of its single-family residential areas, *see City of Memphis v. Greene*, 451 U.S. 100, 127, *reh'g denied*, 452 U.S. 955 (1981), and it may exercise its police powers "'to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.'" *Id.* at 127 n.43 (quoting *Village of Belle Terre v. Boraas*, 416 U.S. at 9). The ordinance controls population density, traffic, and noise in single-family residential areas while preserving the residential character of such areas. The ordinance does *not* prohibit group homes, but merely regulates the number of people who may live in such a home.

In seeking to preserve the tranquility of single-family residential areas and the sense of community and common

values and interests that such areas provide its residents, it is certainly reasonable to conclude that homes occupied by more than five people who are not related--who are not a "family"--may pose a greater threat to the area's tranquility than homes occupied by families consisting of the same number of people. The factor of whether the inhabitants of a single-family dwelling constitute a family bears directly on the outcome which the local government is legitimately seeking by adopting a separate zoning designation for single-family residences.

The City of St. Louis, in a case currently pending before the Eighth Circuit, has examined the impact the Oxford Houses have on single-family neighborhoods and has found that parking difficulties are aggravated, members of Oxford House and their visitors are coming and going at all hours of the day and night, and Oxford House residents are highly transient. Brief of Appellant, *Oxford House v. City of St. Louis*, No. 94-160 EMSL (8th Cir.), at 23-24. The record in that case also indicates that of the 26 people who lived at one Oxford House between May of 1992 and January 26, 1993, 11 relapsed or were suspected of relapsing into drug or alcohol abuse. *Id.* at 24. Oxford House admitted that alcoholics and drug addicts are extremely dangerous when using, all Oxford House members have histories of crime, and that Oxford House experts may not be able to detect a relapse as soon as it happens. *Id.*

As applied in this case, the ordinance admittedly precludes unrelated groups of more than five recovering alcoholics and drug abusers from living in a single-family residential dwelling. However, this preclusion stems from the fact that those recovering are not related to one another, not because they are handicapped. The reasonableness of such a limitation is supported by the fact that the average size of a family in Edmonds is 2.88 persons. 1990 Census

of Population and Housing, Summary Population and Housing Characteristics - Washington, Table 5. Oxford House proposes to house 10 to 12 adults in housing stock that the City of Edmonds generally uses to house approximately three people per dwelling.

The Edmonds' ordinance is therefore a reasonable and nondiscriminatory use of the city's police power to protect the character of single-family residential neighborhoods. The nondiscriminatory nature of ECDC § 21.30.010 will be discussed in greater detail below. It is sufficient to point out here that where a group of more than five recovering alcoholics wanting to live in a single-family residential dwelling are "related by genetics, adoption, or marriage" and therefore constitute a family under ECDC § 21.30.010, they will not be precluded from doing so, handicap notwithstanding. Likewise, five or more unrelated individuals who are not handicapped will be prevented from living in a single-family residential dwelling on the same grounds and for the same reasons as residents of the Oxford House are prohibited from living together in numbers greater than five.

The ordinance's burden on recovering alcoholics and drug abusers is not onerous and leaves them with alternatives: like all unrelated persons, they may live in groups of more than five in areas of Edmonds zoned for higher density residential habitation, or they may live in groups of five or less in single-family areas. In view of Edmonds' long-standing and legitimate interest in maintaining the character of single-family areas, the ordinance is reasonable and, as a restriction on the maximum number of people who may inhabit a dwelling, it is exempt from the FHAA.

B. The Ninth Circuit's Ruling Violates Congressional Intent To Avoid Federal Interference in Fundamental Local Land Use Decisions

Congress intended the FHAA to prohibit discrimination on the basis of handicap. H.R. REP. NO. 711 at 2184. Because this Court has recognized that the power of local governments to zone and control land use is broad, *Schad v. Borough of Mount Ephraim*, 452 U.S. at 68, and that zoning laws are peculiarly within the province of state and local legislative authorities, *Warth v. Seldin*, 422 U.S. at 508 n.18, the Ninth Circuit's interpretation of the FHAA is more invasive of the province of local government than is warranted to accomplish Congress' intent.

In deference to local governmental authority, the Eighth Circuit has affirmed the ability of local communities to apply zoning controls in the form of distancing requirements for group homes, despite a resulting restriction on the housing choices of the disabled. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991). *See also Doe v. City of Butler*, 892 F.2d 315, 321 (3d Cir. 1989) (applying similar reasoning to uphold a zoning ordinance limiting the residency of unrelated adults when applied to a shelter for battered women). The decision of the Ninth Circuit in this case explicitly rejects the reasoning of the Eleventh Circuit, and it also conflicts with the position of the Eighth Circuit of the United States Court of Appeals as well.

Congress cannot have intended to require numerous cities to either rewrite their zoning ordinances or be subject to federal control on basic land use decisions because it included a straightforward exemption for such decisions in the FHAA.

This is particularly so where the zoning ordinance in question is incapable of being discriminatorily applied. The operation of the ordinance does not depend upon the result of a discretionary review of circumstances, which discretion might be exercised discriminatorily. Edmonds' zoning restriction applies where two objectively quantifiable elements exist: (1) more than five individuals are living in the home and (2) those individuals are not related. Thus, where there is no threat or possibility of handicapped individuals being discriminated against, exempting zoning ordinances imposing occupancy limits based on relatedness does not violate either the spirit or the letter of the FHAA.

It must be pointed out that Edmonds' restriction on the number of unrelated persons who may live together does not prevent Oxford House from operating in a single-family residential dwelling. ECDC § 21.30.010 only works to prevent more than five residents from occupying any single-recovery facility. If Oxford House could arrange its administrative affairs so as to be able to function with that number of residents, there would be nothing in Edmonds' zoning code to prevent Oxford House from operating in a single-family residential area.

As discussed above, the disabled are not experiencing discrimination because of their disabilities but rather because of their desire to live in a high-density arrangement in a low-density neighborhood. Edmonds' ordinance treats all unrelated groups evenhandedly, and the FHAA will protect the disabled from any discrimination they may encounter when they choose to live in smaller groups in low density neighborhoods. In short, the Ninth Circuit's interpretation of the FHAA exceeds the nondiscriminatory treatment of the disabled which Congress intended.

II

THE FAIR HOUSING ADMENDMENTS ACT OF 1988 WOULD BE UNCONSTITUTIONAL AS INTERPRETED

A. The Intent of the Ratifiers of the United States Constitution Limits Congress to Its Enumerated Powers

In 1787, the individual states of this nation were presented with a new Constitution that provided for a federal system in which certain enumerated powers were delegated to the national government. Many of the ratifiers of the Constitution, however, feared that the national government would ignore the jurisdictional restraints imposed on it by the proposed Constitution in the form of its few and defined delegated powers and threaten state sovereignty and personal liberty. *See generally* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 U. VA. L. REV. 1387 (1987). Such a government, located thousands of miles from its constituents, could, many thought, become isolated from its constituents, corrupt, and self-perpetuating. "After we have given them all our money, established them in a federal town, given them the power ... to establish their arbitrary government, what resources do the people have left?" II THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 at 62 (Jonathan Elliot ed., 2d ed. 1836) (ELLIOT'S DEBATES).

Many of the ratifiers predicted that the powers granted to the federal government by the proposed Constitution

would result in the despotism of an unresponsive aristocracy within the federal district. *See generally* IV ELLIOT'S DEBATES, *supra*, at 313.

In an attempt to calm these fears and assure ratification, the Federalists claimed that the structure of the Constitution would actually protect state sovereignty and personal liberty. THE FEDERALIST NO. 10 (James Madison). Madison described this structure in THE FEDERALIST NO. 52:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id. at 323 (James Madison) (Clinton Rossiter ed., 1961). That the power was divided between the two governments is evident in the text of the Constitution itself, with "the great and aggregate interests being referred to the national, the local and particular to the State legislatures." THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). "The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). Certainly this would include local land use decisions.

By comparison, the powers delegated to the federal government were described as "few and defined." THE FEDERALIST NO. 45, at 292. These few and defined powers,

as described by de Tocqueville, "have been confined to a certain sphere; and although the despotism of the majority may be galling upon one point, it cannot be said to extend to all." Alexis de Tocqueville, DEMOCRACY IN AMERICA 170 (Henry Reeve trans., Henry Steele Commager, ed. 1839). Those who opposed the ratification of the proposed Constitution were not convinced, however. They wanted a Bill of Rights to assure state sovereignty and individual liberty. In the Virginia ratification debates, for example, George Mason wondered why, if these two items were not "given up, where are they secured? Let the gentlemen show that they are secured in a plain, direct, unequivocal manner." III ELLIOT'S DEBATES, *supra*, at 266. *See also* George Mason, "Objections to the Constitution," *reprinted in* I THE DEBATE, *supra*, at 345-49. After the Constitution was ratified these two items were secured by the Bill of Rights, which includes the Tenth Amendment's reiteration of the textual limits on the federal government. *New York v. United States*, 505 U.S. ___, 120 L. Ed. 2d 120, 137-38 (1992).

It should be noted that the characterization of the powers of the federal government as few and defined came before the adoption of the Bill of Rights. In fact, Hamilton predicted that the adoption of a Bill of Rights would give the federal government the "colorable pretext" to run roughshod over the jurisdictional restraints imposed on it in the text of the Constitution by legislating right up to the edge of whatever individual rights were enumerated. THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

B. The Constitutional Basis for the Fair Housing Act of 1968's Ban on Racial Discrimination Cannot Apply to the FHAA's Ban on Discrimination Because of Handicap

At the time Congress considered passage of Title VIII of the Fair Housing Act of 1968 (FHA), Pub. L. No. 90-284, 82 Stat. 81 (1968), the constitutional basis for its ban on racial discrimination in housing was thought to be the Enforcement Clause of the Fourteenth Amendment and the Commerce Clause, U.S. Const., Art. I, § 8, Cl. 3. Robert G. Schwemm, HOUSING DISCRIMINATION: LAW AND LITIGATION 6-1 (CBC 1994) (citing Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L. J. 149, 152 n.15 (1969)). However, this Court held soon after Title VIII's passage that the ban on private housing discrimination was a valid exercise of Congress' power to enforce the Thirteenth Amendment. Schwemm, *supra*, at 6-1 to 6-2 (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 437-44 (1968)). Since that time, lower courts have relied on *Jones* and the Thirteenth Amendment to uphold the FHA in the face of constitutional attack. Schwemm, *supra*, at 6-2 (citing cases).

The Thirteenth Amendment cannot sustain Congress' interference in this case with local zoning under the FHAA. First, Congress addressed familial status and handicap in the FHAA, not race. Second, Edmonds' zoning scheme does not discriminate on the basis of handicap, as discussed above. Rather, it operates to prevent all nonrelated persons, not just handicapped persons, from living in groups of more than five people in single-family neighborhoods. For example, fraternity members, sorority members, college students, transients, the elderly, and people of modest means are likely to live in congregate arrangements. All these people would be barred from living in such an arrangement in a single-family

neighborhood in the City of Edmonds, not because of some identified characteristic, but rather because Edmonds' zoning scheme protects the character of such neighborhoods by precluding high density living arrangements.

Further, because Edmonds' zoning scheme does not discriminate against the handicapped, the Fourteenth Amendment is not available to justify congressional action under the FHAA in this case. Therefore, only the Commerce Clause remains to sustain the constitutionality of the FHAA. Amicus curiae will demonstrate that the Commerce Clause cannot justify the FHAA in this case.

C. The Commerce Clause Provides No Constitutional Basis for Congress' Interference with Local Land Use Decisions in the Fair Housing Amendments Act of 1988

1. The Commerce Clause Should Be Interpreted To Limit Congressional Authority To Activities That Are Commerce Among the Several States

At the outset, it is clear that the Commerce Clause provides Congress substantial authority to regulate activities that directly or indirectly affect commerce. *E.g., Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 276-77 (1981).[2] Even so, the original

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[2] This is not to say that there are no serious misgivings from legal scholars. Professor Epstein, for example, believes that the New Deal expansion of the Commerce Clause resulted from faith in the benevolence of the national government but was based on questionable legal logic. *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. at 1449-554.

purpose of the Commerce Clause was to quell interstate trade rivalries and to meet the challenges of foreign competition. THE FEDERALIST No. 42, at 266-69 (James Madison) (Clinton Rossiter ed., 1961). Even in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which is often cited for the broad power Congress has under the Commerce Clause, this Court declared that federal power to regulate commerce was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations *other than are prescribed in the constitution.*" *Id.* at 196 (*quoted in, e.g., United States v. Darby*, 312 U.S. 100, 114 (1941)) (emphasis added). One such limitation is that Congress can only regulate *commerce*. The *Ogden* Court defined "commerce" as "commercial intercourse." *Ogden*, 22 U.S. at 189-90; *see also United States v. Mennuti*, 639 F.2d 107, 109-10 (2d Cir. 1981) (noting that *Ogden, Wickard, Atlanta Motel, Jones and Laughlin Steel Company, Katzenbach v. McClung*, and *Perez* all involved businesses or their transactions). Samuel Johnson's DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1765) defined commerce as "[i]ntercourse, exchange of one thing for another, interchange of anything; trade; traffick." Raoul Berger, FEDERALISM: THE FOUNDERS' DESIGN 123 (1987). This definition remains substantially unchanged to this day: "Exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise." THE COMPACT OXFORD ENGLISH DICTIONARY 295 (2d ed. 1992).

Another limitation prescribed by the Commerce Clause is that the commerce must be among the several states. "The enumeration [of particular classes of commerce] presupposes something not enumerated." *Ogden*, 22 U.S. at 195. *See also, e.g., Russell v. United States*, 471 U.S. 858, 859 n.4 and 860-61 (1985) (residential property substantially affected interstate commerce under federal arson statute only because it was used for commercial purposes). As this Court stated

in *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), *overruled on other grounds by National League of Cities v. Usery*, 426 U.S. 833 (1976), federal power is limited to "'commerce,' and not all commerce but commerce ... among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains." *Id.* at 196. The Constitution, read logically and with knowledge of the intent of the ratifiers, should limit congressional authority over an activity *only if it was both "among the several States" and "commerce."*

2. When Congress Relies on the Commerce Clause to Justify Legislation, There Must Be a Nexus Between Interstate Commerce and the Legislation

Though Commerce Clause jurisprudence has adapted through the transition from a local to a national economy, *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 247 (1983) (Stevens, J., concurring), its grant of authority, as discussed above, is not unlimited. The Commerce Clause was given its most generous interpretation in *Wickard v. Filburn*, 317 U.S. 111 (1942), a case described by Justice Douglas as having reached the "outward limits" of that clause. William O. Douglas, *The Court Years, 1939-1975* 50 (1980). In *Wickard*, federal regulation of wheat grown at home for home consumption was upheld on grounds that it was regulating activities that affect interstate commerce. Yet, the language of the statute at issue in *Wickard*, the Agricultural Adjustment Act of 1938, expressly addressed how "to avoid surpluses and shortages and the consequent abnormally low or high wheat prices *and obstructions to commerce*." 317 U.S. at 115 (emphasis added).

Wickard certainly involved an extraordinary use of the Commerce Clause. Although the wisdom of such generous New Deal interpretation of the Commerce Clause is open to some debate, it is the law. *See* Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387. However, because of the logical and political difficulties inherent in such decisions, *id.*, *Wickard* ought to remain the outward limit of the Commerce Clause rather than using this litigation to expand the clause even beyond its present tortured extent.

Another seminal case in the history of Commerce Clause interpretation is *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), which upheld the constitutionality of the Civil Rights Act of 1964, primarily on the basis of the Commerce Clause. Section 201(c) of that Act contained a lengthy description of the nature of the activities that were found to affect commerce. This Court had little trouble finding that Congress' regulation of restaurants and hotels was necessary and proper to the regulation of activities that affect commerce. Similarly, the statute at issue in *Katzenbach v. McClung*, 379 U.S. 294 (1964), involved extensive legislative history of testimony and affidavits submitted to Congress by a multitude of witnesses. This Court held that while Congress made no formal findings, the congressional record was replete with evidence of the burdens placed on interstate commerce by racial discrimination in restaurants. This Court found that the focus of the legislation was to prevent "farreaching" harm to commerce. 379 U.S. at 301. This Court relied heavily on the companion *Heart of Atlanta Motel* case, writing:

> [T]he voluminous testimony [before the Senate and House Committees] present overwhelming

evidence that discrimination by hotels and motels impedes interstate commerce.

379 U.S. at 253. These cases are not precedent to authorize judicial findings of Commerce Clause authority where Congress made none and where no evidence to support such a finding is present in the congressional record.

Where the Commerce Clause has been used to justify congressional legislation, Congress has expressly referred to the Commerce Clause in the legislation. Nonetheless, Congress made no reference to the Commerce Clause in the FHAA, 102 Stat. at 1619-36, and it made only the vague statement in the FHA that "[i]t is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States." FHA § 801, 82 Stat. at 81, *codified at* 42 U.S.C. § 3601 (emphasis added). When Congress fails to require a nexus with interstate commerce on the face of its enactment, it demonstrates that it did not adequately consider the intrusion it was effecting into matters traditionally and primarily left to the states. *E.g.*, *Gregory v. Ashcroft*, 501 U.S. ___, 115 L. Ed. 2d 410, 426, 430 (1991), *United States v. Bass*, 404 U.S. 336, 350 (1971). Further, the congressional record of the debate on the FHAA contains only a passing reference to the Commerce Clause. Senator Specter opined that the size of bathrooms in multiunit housing affects interstate commerce because "the [building] materials passed in interstate commerce." 134 Cong. Rec. S10541 (daily ed., Aug. 2, 1988) (remarks of Sen. Specter). Although a court reviewing legislation "must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding," *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 17 (1990) (citing *Hodel* 452 U.S. at 276), these findings are too slender a reed to support the burden of a reasonable connection between

interstate commerce and local zoning schemes for single-family residential neighborhoods.

Despite the absence of any explicit reference to the Commerce Clause in the FHA and the FHAA, some lower federal courts have relied on the Commerce Clause to uphold the constitutionality of the ban on discrimination on the basis of familial status and handicap in the FHAA. Schwemm, *supra*, at 6-3 n.15 (citing *Seniors Civil Liberties Association, Inc. v. Kemp*, 965 F.2d 1030 (11th Cir. 1992); *Morgan v. Secretary of Housing and Urban Development*, 985 F.2d 1451, 1455-56 (10th Cir. 1993); *Pulcinella v. Ridley Township*, 822 F. Supp. 204, 210-11 (E.D. Pa. 1993). *But see Michigan Protection and Advocacy Service, Inc. v. Babin*, 799 F. Supp. 695, 727-42 (E.D. Mich. 1992), *aff'd on other grounds*, 18 F.3d 337 (6th Cir. 1994) (holding that Congress lacks power under the Fourteenth Amendment and the Commerce Clause to ban handicap discrimination in a case involving a home sale by one private party to another). Should this Court also find some sort of psychoanalyzed congressional intent, *Chisom v. Roemer*, 115 L. Ed. 2d at 378 (Scalia, J., dissenting), in the FHAA, the enumeration of Article I powers becomes meaningless, allowing Congress to reach into any area regardless of the nexus such conduct may have with interstate commerce. The justification of "commerce" cannot be bootstrapped onto every realm of human endeavor that may affect commerce in order to justify congressional involvement. The Commerce Clause does not justify congressional use of a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. at 196 n.27. *See also* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, 313-14 n.2 (2d ed. 1988).

3. There Is No Rational Connection Between Local Housing Laws Affecting the Handicapped and Interstate Commerce

This Court outlined the proper test for determining whether a statute falls within the auspices of the Commerce Clause in *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981):

> A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.

Thus, there must be a nexus between the regulated activity and interstate commerce. Under the rational basis to affect commerce test alone, any and every activity in the universe could be regulated because it would somehow affect commerce. Judicial inquiry is limited to discovering whether such a finding of nexus is rational and then to an inquiry into whether the regulatory scheme itself is rational.

On the first point of inquiry, as discussed above, in neither the language of the FHA nor of the FHAA did Congress claim to be acting under the Commerce Clause to bring local land use control within the federal ban on housing discrimination, and Congress made no findings that local zoning decisions affect interstate commerce. Although there was one meager reference, set out above, to interstate commerce in the congressional debate on the FHAA, that reference was to the movement of building materials in interstate commerce as a predicate for the FHAA's imposition of federal construction standards on multiunit rental dwellings. This has nothing to do with Congress'

decision to inject the federal government into local land use even when local zoning schemes do not discriminate against the handicapped as such. Congress cannot find that a particular activity affects interstate commerce, describe that activity in excessively general terms, and then conclude that all activities embraced by the general terms affect interstate commerce. *See City of Richmond v. J. A. Croson Company*, 488 U.S. at 506 (precluding a municipality from adopting a remedial policy in favor of minorities in general on the basis of discrimination against African Americans in particular).

On the second point of inquiry, even if Congress stated that it was acting under the Commerce Clause to enact the FHAA, the FHAA remains unconstitutional in this case. There is simply no reasonable connection between Congress' goal of forbidding discrimination in housing on the basis of handicap and the means it chose of interfering with the City of Edmonds' zoning scheme, which does not discriminate on the basis of handicap.

CONCLUSION

A local zoning ordinance placing occupancy restrictions on the number of persons who may occupy a single-family dwelling need not place limits on related persons as well as unrelated persons in order to be exempt from the application of FHAA's antidiscrimination provisions. The construction of FHAA's exemption provision adopted by the Ninth Circuit misinterprets Congress' intent behind the exemption and thereby leaves many local governments with the choice of either redrafting their zoning laws or having the federal government unduly intrude into their land use decisions.

This construction results in an unwarranted intrusion into the local government's ability to adopt the type of

nondiscriminatory occupancy limitations that it feels is most appropriate for its circumstances. Moreover, such intrusion is not justified under any of the enumerated powers held by Congress. Not only did the framers of the Constitution fail to provide Congress with such power, great care was taken to ensure the citizenry that such intrusion would not occur. Both the history of Congress' use of Commerce Clause power and specific statements made by Congress in adopting the FHAA indicate that Congress has overstepped the bounds of its constitutionally recognized powers by subjecting the ordinance at issue herein to FHAA oversight. Pacific Legal Foundation therefore urges this Court to recognize federal deference to local government's authority and autonomy and reverse the Ninth Circuit's decision and find that Edmonds' zoning ordinance is either exempt from FHAA provisions or, in the alternative, that the FHAA is unconstitutional as applied to the facts of this case.

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Respectfully submitted,

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